United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2128

To be argued by
BARBARA SHORE RESNICOFF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. BARRY WARREN KIBBE,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendant,
Auburn Correctional Facility,

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

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Preliminary Statement

Petitioner-appellant appeals from an order dated June 27, 1975 of the United States District Court for the Northern District of New York, Foley, J., denying petitioner-appellant's application for a writ of habeas corpus. This Court issued a certificate of probable cause on October 7, 1975 and counsel was assigned.

Questions Presented

1. Whether petitioner's arrest was lawful?

2. Whether the seizure of petitioner's glasses was lawful?

Statement of Facts

Petitioner-appellant ("petitioner") is incarcerated in Auburn Correctional Facility as the result of a conviction in Monroe County Court, (Ogden, J.), after trial by jury of the crimes of murder, robbery in the second degree and grand larceny in the third degree. He was sentenced to concurrent terms of 15 years to life imprisonment on the murder conviction, 5-15 years on the robbery, and an indeterminate term of up to 4 years on the grand larceny. The Appellate Division, Fourth Department, affirmed his conviction on April 5, 1973 (41 A D 2d 218). The Court of Appeals affirmed the conviction on November 24, 1974 (35 N Y 2d 407).

A. The Crime

The events of the crime, petitioner's apprenension by the police, and the manner of obtaining evidence were developed during the trial. The pages of the trial minutes, an exhibit in this Court, shall be hereafter described as "R-".

According to the testimony, on December 30, 1970 Tom Stafford had been drinking heavily at Nick & Corky's Bar until the bartender, who had personally served him 6 to 8 drinks, "shut off" the drinks [O'Shea: R-723; 724, 736]). Stafford was flashing hundred dollar bills and was thoroughly intoxicated [O'Shea: R-723]. Stafford kept asking if someone would give him a ride to Canaadaqua, New York [O'Shea: R-730, 740].

The petitioner and Krall, having already decided to steal Stafford's money, agreed to drive Stafford in Kibbe's automobile [Kibbe's statement: R-840]. The three men left and went to another bar where Stafford was denied service [Kibbe's statement: R-849]. They then went to a third bar where they were served, and each had a drink or two.

After they left, the three men entered Kibbe's automobile. Stafford was in the rear seat [Kibbe's statement: R-849]. Krall drove, while Kibbe demanded that Stafford turn over any money he had. Kibbe slapped Stafford several times, and took his money [Krall: R-1017, Krall's statement: R-827, 828]. Kibbe made Stafford lower his trousers and take off his shoes to "show him there was more money" [Kibbe's statement: R-853].

They then let Stafford out of the car [R-852-857]. He sliped and fell on the shoulder of the highway. His trousers were around his ankles, his shirt rolled up towards his chest. He was

shoeless and had no outer clothing on [R-853-854].

Petitioner placed Stafford's boots and jacket on the shoulder of the highway [Kibbe's statement: R-852].

Stafford was abandoned between 9:30 and 9:40 on a rural 2-lane highway. There were no highway lights. The temperature was near zero, and there were winds which gusted the previous fallen snow across the highway. The nearest structure was a gasoline station over a quarter mile away, on the other side of the highway [Cooper: R-647-648].

At approximately 10 P.M., Michael Blake, a college student, was driving in the northbound lane, at approximately 50 miles an hour [Blake: R-619]. Two cars approaching from the opposite direction flashed their headlights. After he passed the second car he noticed a person sitting in the middle of the road with his hands up [R-618]. Blake didn't have time to react and struck Stafford. He stopped the truck and came back to see Stafford and observed that the trousers were at his ankles and the shirt around his chest [R-619]. This was confirmed by the Deputy Sheriff [Cooper: R-678].

The victim was transferred to the hospital by an ambulance. He grew steadily worse and died [R-636].* The Medical Examiner testi-

* The first ambulance carrying Stafford was hit in the rear by a car, and Stafford had to be transferred to another ambulance. However, the ambulance attendant testified that Stafford's condition was unaffected by that transfer [Harber: R-636].

fied that death had occurred fairly rapidly from massive head injuries, and that the victim had been highly intoxicated with a .25% by weight of alcohol concentration in the blood [Edland: R-672].

B. The Arrest of Kibbe

On December 31, 1970, Kibbe was picked up at Nick & Corky's Tavern and taken to the Monroe County Sheriff's Office by Detective Burton Verkay at about 4:00 P.M. [R-76, DeRosa: R-761]. He was read his rights from a waiver card and he signed it [DeRosa: R-761]. He was asked for identification and asked to empty his pockets. He was asked if he had a $100 bill, which he produced [R-80, DeRosa: R-761]. He was reinterviewed with a stenographer [R-81, DeRosa: R-761] and then made a true statement to Assistant District Attorney Cornelius [R-770, DeRosa: R-771].

His co-defendant Krall was separately questioned [DeRosa: R-766].

C. Search of Kibbe's car

The co-defendant Krall drove Kibbe's car to Krall's apartment. Detective Emerson and DeRosa went to locate the car [Emerson: R-887] which was blocking the entrance to the apartment house.

As they were watching the car, a man came out and stated

his car was blocked. Emerson offered to help push it backward [Emerson: R-890]. He opened the unlocked driver's door, looked down on floor board, and in the light from a street lamp, noticed a white envelope [Emerson: R-890]. A print registration slip was on top with the name of George Stafford [Emerson: R-890]. The papers, and all other items were then photographed and all items were removed from the vehicle, with the exception of the eyeglasses [R-892].

After Kibbe's car was towed to the Sheriff's garage, Emerson returned with Detective Verhay to the car as Emerson thought he had left a folder in the car. Verhay saw the eyeglasses. They took photographs of the eyeglasses and removed them [Emerson: R-898].

D. The State Court Trial

Petitioner Barry Warren Kibbe and his co-defendant Roy Krall were charged in a four-count indictment with the murder of George Stafford under § 125.25(2) of the New York Penal Law charging:

> "A person is guilty of murder when --
>
> (2) under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

They were charged with robbery in the first degree, robbery in the

second degree and grand larceny in the third degree.

Petitioner moved for trial to suppress his statements, the $100 bill, and the evidence taken from the car. A bifurcated suppression hearing was held. Prior to the trial the court held that the statements and the money could be admitted into evidence. During the trial, after a hearing, the court held the police had probable cause to search the car.

The court charged the jury with a definition of each term on Penal Law, § 125.25, including "indifferent" as "disinterested without care or consideration for the consequences of the act." There was no objections by petitioner's counsel or co-defendant's counsel to the charge concerning § 125.25 except to defining indifference to human life as applying to the human life of George Stafford. There were no requests or exceptions concerning causation or intervening causes.

The two defendants were convicted of murder, robbery in the second degree and grand larceny in the third degree.

Prior Proceedings

1. State

Petitioner and his co-defendant appealed his conviction in the appellate court solely on the grounds that Stafford's death was not caused by them. The court held that there was sufficient

evidence of guilt. Even at this stage there was no appeal based on the sufficiency of the charge. Although the dissenting justice claimed the charge was insufficient, the majority held that "the charge together with language of the statutes and the indictment and the evidence were sufficient to inform the jury on this subject" and reversal was not required in the interest of justice. People v. Kibbe, 41 A D 2d 228.

On Appeal to the Court of Appeals, petitioner's counsel first raised the issue of the jury trial and the question of search and seizure of evidence. The Court of Appeals affirmed People v. Kibbe, 35 N Y 2d 407. The court held that defendant's actions were a sufficiently direct cause of the ensuing death. supra at 413. They rejected the claim that the jury charge was erroneous, as this was in the discretion of the Appellate Court.

2. Opinion of District Court

The District Court in denying the application for a writ of habeas corpus, adopted the findings and analysis of the state courts and held that under the circumstances, the petitioner failed to raise a question of constitutional dimensions.

The court also held that questions of evidence at state trial form no basis for habeas corpus relief unless there is evident deprivation of a fundamentally fair trial and that was not shown here.

The court below also held that the statement of petitioner was properly admitted into evidence and that state court had discretion in refusing to grant separate trials to petitioner and his co-defendant. He also held that federal habeas corpus cannot be used to test the sufficiency of evidence.*

POINT I

THE TRIAL COURT'S CHARGE TO THE JURY DID NOT VIOLATE CONSTITUTIONAL RIGHTS.

Petitioner claims that the trial court's omission of specific instruction on the element of causation was violative of due process. However, petitioner first seeks to relitigate the entire state proceeding, by the claim that jury could have found that Blake's driving was a sufficiently independent cause of death to absolve petitioner of guilt. However, review by federal court of state court convictions "is limited to the enforcement of those fundamental principles of liberty and justice which are secured by the Fourteenth Amendment." McNabb v. United States, 318 U.S. 322, 340 (1943). The Appellate Court and the Court of Appeals have both upheld petitioner's application as satisfying the elements of Penal Law, § 125.25.

* Appellant's brief only challenges the decision regarding the jury charge and the admission of the glasses claim. Therefore, the part of the decision dealing with the other items in evidence and the other claims is not open to consideration. Benenson v. U.S., 385 F. 2d 26, 29 (2d Cir., 1967) FRAP (3-c), 28.

As was noted in the N.Y. Court of Appeals decision, People v. Kibbe, 35 N Y 2d 407, 413, the actions of Kibbe and Krall were a sufficiently direct cause of the death of George Stafford so as to warrant the imposition of criminal sanctions.

The court relied on the criminal case People v. Kane, 213 N.Y. 26. The court noted that Stafford's choices were either freezing to death on the shoulder of the road or crossing the highway toward the gas station, when he was intoxicated and there was insufficient illumination. Blake was operating his car at low beam because of approaching traffic, and his action was not considered a sufficient supervening act. Petitioner's citations of Commonwealth v. Roob, 170 A D 2d 310 (Pa. Ct. of App. 1961); Bush v. Commonwealth, 78 Ken 268 (1880); State v. Pell, 119 N.W. 154 (Iowa, Sup. Ct., 1909); Warren v. State, 25 So 2d 51, 53 (Pa. Ct. of Appeals) are interesting. However, the citations do not hide the fact that the New York court held that there was sufficient finding of causation. This Court is bound to construe a state statute according to the construction by the Court of Appeals, O'Brien v. Skinner, 414 U.S. 524, 531 (1974).

Petitioner goes on to claim that the jury charge was insufficient. However, the Appellate Division considered the dissenting justice's statement that the reversal on the basis of the jury charge was required in the interest of justice. The majority went on to state that the charge, along with the language of the

statutes and indictment and the evidence was sufficient to inform the jury on the subject and there was no need for reversal. The lower court's decision was affirmed by the Court of Appeals.

It is established principle in this circuit that a jury charge is normally a matter of State law. "A jury charge in a state trial is normally a matter of state law is not reviewable on federal habeas corpus absent a showing that the alleged errors were so serious as to deprive defendant of a federal constitutional right." U.S. ex rel. Smith v. Montanye, 505 F. 2d 1355 (2d Cir., 1974) (holding that state court's failure to charge on intoxication or its effect and instruction concerning petitioner's failure to testify did not deprive defendant of fundamental due process). United States ex rel. Santiago v. Follette, 298 F. Supp. 973 (S.D.N.Y., 1969); United States ex rel. Mintzer v. Dros, 403 F. 2d 42 (2d Cir., 1967); United States ex rel. Peterson v. LaVallee, 279 F. 2d 396, [illegible]0 (1960); Corby v. Conboy, 337 F. Supp. 517 (S.D.N.Y., 1971).*

In this case, there was a full and fair hearing. Viewed in totality, the judge's charge did not deprive the petitioner of a fair trial. As the Supreme Court has stated in holding a State trial court's erroneous "presumption of truthfulness charge (where the

* Bollenbach v. United States, 326 U.S. 607, 612 (1946); United States v. Clark, 475 F. 2d 240 (2d Cir., 1973); United States v. Field, 466 F. 2d 119 (2d Cir., 1972) and Cool v. United States, 409 U.S. 100 (1972) are all direct appeals where the federal court exercises appellate jurisdiction. They are therefore distinguishable from habeas corpus actions, such as this case.

defendant was silent)" did not reach constitutional dimensions:

> "Before a federal court may overturn a conviction resulting from a state trial in which the instruction was used, it must be established not merely that the instruction is undesirable, erroneous or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment. . . not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which only result in the judgment of conviction." Cupp v. Naughton, 414 U.S. 141, at 146.

Furthermore, to reverse the trial court would upset the principles of state federal comity. In Schaefer v. Leone, 443 F. 2d 482 (2d Cir., 1971), there was a claim that the jury charge left out instructions concerning intent. The state courts affirmed the conviction. This Court stated:

> "[The trial court's] action has been affirmed by the highest court of the commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the State law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law if one occurred, as a denial of due process, otherwise every erroneous decision by a state court on state law would come here as a federal constitutional question." Schaefer v. Leone, 443 F. 2d 182, 195 (1971).

It is clear from the transcript that the petitioner received a full and fair hearing, and that he was not deprived of his fundamental right to due process of law. Both the State Appellate Court and the Court of Appeals held that there was sufficient evidence for the guilty verdict, and an independent reading confirms that opinion. Compare: Vachon v. New Hampshire, 414 U.S. 478, 480 (1974).

It is noteworthy that petitioner's counsel did not request a specific charge nor make any objection to the judge's charge on the question of causation. Petitioner's counsel did not raise this question on appeal.

POINT II

THE SEIZURE AND SEARCH OF PETITIONER'S CAR WAS LAWFUL.

Petitioner argues that the glasses of the victim were illegally seized from petitioner's car by police officer Emerson as evidence, and that the glasses should have been suppressed.

He claims that the search was unlawful under Coolidge v. New Hampshire, 403 U.S. 443 (1971).

After holding a suppression hearing, the trial court held that the police had probable and reasonable cause to search the car. These findings are entitled to great weight by this

court. Clemons v. U.S., 408 F. 2d 1230, 1241-42, 1246 (D.C. Cir., en banc 1968), cert. den. 394 U.S. 964 (1969). See also U.S. ex rel. Miller v. LaVallee, 436 F. 2d 875, 876 (2d Cir., 1970), cert. den. 402 U.S. 914 (1971).

Moreover, from the evidence at the trial, it is clear that the police had independent probable cause to seize and search the car.

The police went to impound Kibbe's car, as an instrumentality of the crime.*

Kibbe's car, illegally parked in front of Krall's house, was blocking another car. Emerson helped push the car out of the way, as part of the police "community caretaking function". Cady v. Dombrowski, 413 U.S. 441-443 (1973). The registration card of Stafford and the glasses inadvertently came into view pursuant to an initial lawful intrusion. Harris v. United States, 390 U.S. 234, 236; U.S. ex rel. LaBelle v. LaVallee, 517 F. 2d 750 (1975).

Once the policeman saw the registration card linking the car with Stafford's murder, he was justified in seizing all contents of the car, including the glasses. In U.S. ex rel. LaBelle v. LaValle, supra at 750 (1975), this Court held that such seizure and

* Although petitioner claims illegality in towing and impounding the car, it is clear that the police were justified in taking the car. The car was an instrumentality, at the very least, of the robbery, both defendants were in custody, and the police were entitled to secure the car.

search, based on an initial lawful entry was legal. The court noted that the reasonableness for intrusion of cars is different than for stationary areas, giving ample Supreme Court support. Cardwell v. Lewis, 417 U.S. 583, 589-90 (1974); Chambers v. Maroney, 399 U.S. 42, 50-51 (1971). The fact that the glasses were not taken until 1 1/2 hours later at the police station does not obscure the fact that they could be properly seized.

Once a legal search has begun, and criminality has been established, the later taking of evidence is an extension of the original search. People v. Neulist, 43 A D 2d 150 (2d Dept., 1973).

Coolidge v. New Hampshire, does not substantiate petitioner's claims of intrusion. In Coolidge, the car was parked on the defendant's driveway and thus on private property. Here, as in Chambers v. Maroney, 399 U.S. 42, 50-51, and Cardwell v. Lewis, supra 417 U.S. at 593 the automobile was on the public thoroughfare.

It should also be noted that Detective Verhay had an independent reason for seizing the glasses. Detective Emerson went back to the car with Detective Verhay to search for a missing file. The glasses were still in plain sight and could still be taken as evidence.

Assuming arguendo, that the glasses should have been suppressed as evidence, the admission as evidence was harmless error

in light of the overwhelming evidence against petitioner. This evidence included testimony of the intoxicated undressed condition of the victim, statements by the petitioner, and other real evidence. The fact that the victim wore glasses was established by his woman-friend's testimony, and the fact that he was not found with glasses can be established by the Deputy Sheriff's testimony. Chapman v. California, 386 U.S. 18, 22 (1967).

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
December 22, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CONSTANCE TREZZA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 22nd day of December , 1975 , she served the annexed upon the following named person :

SHELIA GINZBURG
Legal Aid Society
Federal Defender Services Unit
509 U.S. Courthouse
Foley Square
New York, N.Y. 10007

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Constance Trezza

Sworn to before me this
22nd day of December , 1975

Rosalind S. Fine

Assistant Attorney General
of the State of New York